

MEMORANDUM OF LAW

DATE: October 27, 1994

TO: Jack Krasovich, Deputy Director, Park and Recreation
Department

FROM: City Attorney

SUBJECT: Legality of Banning Newspaper Racks in Dedicated Parks

QUESTION PRE

You have asked us to research the legality of the Union Tribune Newspaper ("U.T.") placing newsracks in Balboa Park. You have also asked whether the City can completely ban the placement of newspaper racks in dedicated parks.

SHORT ANSWER

Based on an analysis of the present San Diego Municipal Code Newsrack Ordinance, sections 62.1001-62.1013, U.T. is entitled to place newspaper racks in dedicated parks subject to the City's reasonable time, place, and manner restrictions. (A copy of the ordinance is attached for your reference.) A complete ban on the placement of newspaper racks in dedicated parks would violate the First Amendment of the U.S. Constitution.

BACKGROUND

Newspapers, as well as other companies that offer free circulars, have placed their newspaper racks in different locations in Balboa Park. Recently Park and Recreation staff removed some newly-installed U.T. racks in Morley Field and the Prado area because of perceived problems with congestion and aesthetics. The distributor was notified after the removal. U.T. has complained of the removal and contends that there is an absolute right to place newspaper racks in any area of Balboa Park.

DISCUSSION

A. FIRST AMENDMENT RIGHT TO PUBLISH AND DISTRIBUTE NEWSPAPERS

Freedom of speech and press protects not only the right to publish, but also the right to distribute and circulate. In *Kash Ent. Inc. v. City of Los Angeles*, 19 Cal. 3d 294, 300 (1977), the California Supreme Court held that "the right to distribute newspapers and other periodicals on the public streets lies at the heart of our constitutional guarantees of freedom of speech and freedom of press." This right to distribute also includes the right to distribution by

means of newsracks. *Id.* at 302.

First Amendment rights are not absolute, however, and the government may place reasonable time, place, and manner restrictions on newsracks. In *Kash*, 19 Cal. 3d at 302, the court stated, "localities retain authority to impose reasonable 'time, place, and manner' regulations on the use of newsracks, so as to protect legitimate state interests while preserving First Amendment rights." In order to assert a valid time, place, and manner restriction, the government must establish that the regulation: (1) serves a significant governmental interest; (2) is narrowly tailored to further the state's interest; (3) is content-neutral; and (4) leaves open ample alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983).

B. NEWSRACKS IN DEDICATED PARKS

1. First Amendment Protection. Parks are "public forums" historically used for First Amendment purposes of expression and assembly. Freedom of speech and the press protects not only the right to publish, but also the right to distribute and circulate. The U.S. Supreme Court long ago held in *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1937), that "freedom of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."

2. Time, Place, Manner Restrictions. Absolute governmental discretion in granting permits to place newsracks is an unconstitutional prior restraint. See *City of Lakewood v. Plain Dealer*, 486 U.S. 750, 756-57 (1988). In order to restrict the placement of newsracks, therefore, valid time, place, and manner regulations are necessary. The San Diego Municipal Code does not prohibit newsracks in dedicated parks, but rather contains reasonable time, place, and manner restrictions. Thus, U.T. is entitled to place newsracks within Balboa Park, so long as the newsracks conform to the requirements of San Diego Municipal Code sections 62.1004 - 62.1006.

3. Total Ban Not Allowed. While courts have allowed reasonable restrictions, a complete ban on the placement of newsracks in dedicated parks would most likely be held unconstitutional. Federal and California courts have held that time, place, and manner regulations do not justify a complete ban on the protected activity. *Perry Educ. Ass'n*, 460 U.S. at 45; *Wollam v. City of Palm Springs*, 59 Cal. 2d 276, 284 (1963).

C. COMMERCIAL SALES IN BALBOA PARK

Although the sale of newspapers is a commercial activity, it nevertheless retains First Amendment protection. In *City of Lakewood*, 486 U.S. at 756, the U.S. Supreme Court commented that "of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away." However,

newspaper sales in Balboa Park must comply with San Diego Municipal Code section 63.0102(b)(13), which prohibits commercial sales in the Park without the written consent of the City Manager. (A copy of this section is attached.)

We recommend that staff work with the U.T. and other newspaper vendors and distributors, as needed, to work out compliance with the City's newsrack ordinance in order that a permit may issue. In addition, the guidelines outlined in section 63.0103, pertaining to the issuance of a permit, should be followed.

D. REMOVING NEWSRACKS WITHOUT NOTICE

San Diego Municipal Code section 62.1007 reads in relevant part that, "Upon a determination by the City Manager that a newsrack has been installed, used or maintained in violation of any of the provisions of this division, he shall cause an order to be issued to the distributor to correct the offending condition." If the distributor fails to correct this violation within three business days, the City Manager may then have the offending newsracks removed.

In *Kash*, the court held that portions of a Los Angeles newsrack ordinance which permitted summary seizure of newsracks without prior notification to the distributor were invalid. The court stated, "under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases in enforcing valid regulations . . . without regard to the possible consequences for constitutionally protected speech." *Id.* at 310 (quoting *Marcus v. Property Search Warrant*, 367 U.S. 717, 731 (1961)). However, a distributor's violation of valid time, place, and manner restrictions does not allow the government to violate the distributor's due process rights.

As an exception, where a newsrack is so placed as to pose an immediate safety hazard, the rack may be summarily removed without violating the distributor's due process rights. See *Kash*, 19 Cal. 3d at 313. But we have not been given any indication that the U.T. newsracks in Balboa Park caused such a hazard.

E. AVAILABLE OPTIONS REGARDING NEWSRACKS

1. **Uniform Newsrack Policy.** If the department decides that a more uniform newsrack policy is desired, the provisions of the City's existing newsrack ordinance provide clear guidelines. In particular, San Diego Municipal Code section 62.1006 outlines the manner in which the City may require uniform and coordinated newsrack construction and appearance at particular locations. We will be glad to work with staff to assist in implementing these sections if you desire.

2. **Specific Areas Excluded.** The department may wish to prohibit newsracks in a particular area, i.e., the Prado in Balboa Park. Of course, any such prohibition must comply with reasonable time, place, and manner requirements: it must be content-neutral, narrowly tailored to further a significant government interest, and leave open ample

alternate channels of communication. An amendment to the Municipal Code would be required, since presently the Code does not provide for any "newsrack-free" areas. We would be glad to assist you with such an ordinance as well if you desire.

CONCLUSION

If its newsracks comply with the requirements of San Diego's newsrack ordinance, the Union Tribune may place newsracks in Balboa Park. A complete ban on newsracks in dedicated parks would not be constitutional, since the distribution of news is protected by the First Amendment. In addition, when proper procedures are followed, the Manager should grant the permit required by the Municipal Code for newspaper sales in the Park.

JOHN W. WITT, City Attorney

By

Mary Kay Jackson

Deputy City Attorney

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Attachments

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